

October 21, 2016

WITHOUT PREJUDICE

Via email only

POSTAL REGULATORY COMMISSION
901 NEW YORK AVENUE NW
SUITE 200
WASHINGTON, D.C. 20268

Re. Order RM 2016-10 10/1/2016 No. 3560

Commission Panel Members:

Order RM 2016-10 10/1/2016 No. 3560 granted access and imposed indemnification obligations on UPS in addition to the non-disclosure language in the PRC's standard protective order. As set forth in Joint Status Report of UPS RM 2016-10 10/18/2016 UPS anticipates the execution and filing of the Non-Disclosure Agreement (NDA) by Friday, 21 October 2016.

As originally drafted USPS included in the NDA a UPS obligation to indemnify impacted third parties and adding a signature line for Canada Post Corporation (CPC), the uniquely identifiable third party, to demonstrate its accord with the provisions of the NDA.

CPC agreed with, and supported the NDA as drafted by USPS.

UPS reviewed and struck all reference to impacted third parties, and in addition sought to narrow the scope of improper disclosure to wilful and knowing improper disclosure.

USPS sought CPC's further opinion on the NDA as revised by UPS.

CPC has asked USPS to restore the scope of improper disclosure to any and all improper disclosure. CPC has in addition asked USPS in the letter attached for the Panel's ease of reference (Attachment 1), for the 18 months following UPS access to the confidential information:

- To monitor and report to CPC major customer behaviour that may suggest the occurrence of a breach of the NDA;
- To undertake to enforce the indemnification provisions of the NDA upon the request of CPC; and
- To indemnify CPC for any and all loss arising from improper disclosure of its confidential information by UPS, its agents or representatives

USPS has declined CPC's request for assistance.

Given the unique position of CPC as the only identifiable impacted third party amongst all of the postal operators of the world to whose confidential information UPS's agents and representatives will have access under the Order; and given the magnitude of the cross-border parcel flows between USPS and CPC and the seriousness and significance of the impact improper disclosure of CPC's confidential information would have on its revenues and legitimate commercial interests; and given the highly competitive nature of the United States/Canada cross-border parcel business: CPC respectfully requests the PRC to order that the NDA set out both a broad scope of improper disclosure that embraces all forms or causes of improper disclosure, as well as a UPS duty to indemnify impacted third parties. In addition, we concur that in the interest of fairness, transparency and equity CPC's signature should be added to the NDA to indicate its accord as an impacted third-party as set forth as attached. (Attachment 2)

All of which is respectfully submitted at *OTawa* this *21* day of October 2016.

Yours faithfully,



Donald Campbell
Senior Counsel, Canada Post

DC/dlr
Encls (2).

Attachment 1

[USPS letterhead]

Re. PRC docket RM 2016-10

Pursuant to PRC Order RM 2016-10 10/11/2016 No. 3560 the PRC has granted access to certain third parties to certain confidential information filed by the USPS under seal in non-public folder USPS-RM2016-10/NP1 in connection with its Petition RM 2016-10 08/22/2016. Amongst that confidential information is to be found commercially confidential and sensitive information pertinent to cross-border mail flows between USPS and foreign postal operators. The information belonging to Canada Post Corporation is, uniquely amongst the data set, readily identifiable as such. Improper disclosure of Canada Post's confidential information thus poses unique risks to US/Canada cross border parcel flows, itself a highly competitive business.

Recognising the unique risks faced by Canada Post, USPS hereby undertakes over the 18 months following the granting to third parties of access to the Confidential Information to:

1. be vigilant and monitor trends in USPS's major commercial customers' behaviour from which could be reasonably inferred an improper use or disclosure of Confidential Information by UPS, its agents or representatives; and
2. enforce the indemnification provisions of the NDA upon request by Canada Post; and
3. indemnify Canada Post from and against all loss or damage, including lost revenues, arising from, or in connection with the same.

Name

Signature

Title

Date

I am authorised to bind the United States Postal Service.

Attachment 2

NON-DISCLOSURE AGREEMENT

This is an agreement (the "Agreement") by and between the United States Postal Service, an independent establishment of the Executive Branch of the United States Government, (the "Postal Service") and United Parcel Service, a _____, _____ and having a place of business at _____ ("UPS"). The Postal Service and UPS may be referred to individually as a "Party" or "party", and together as the "Parties" or "parties".

WITNESSETH

WHEREAS, in proceedings before the Postal Regulatory Commission, Docket No. RM2016-10, the Postal Service has filed a Periodic Reporting "Proposal Two" for review and approval by the Postal Regulatory Commission. As part of this proceeding, the Postal Service has also filed USPS-RM2016-10/NP1 (the "Confidential Information") on a nonpublic basis, because it contains confidential and commercially sensitive information; and

WHEREAS, UPS has filed a motion with the Postal Regulatory Commission seeking access to USPS-RM2016-10/NP1 for eleven specified individuals, consisting of outside counsel and consultants of UPS. These individuals have signed required certifications which state that, if granted access, they shall review USPS-RM2016-10/NP1 for purposes of analyzing Docket No. RM2016-10 only (the "Intended Purpose"), and subject to protective conditions incorporated into each of the eleven individuals' certifications, which certifications have been filed as attachments to the UPS motion; and

WHEREAS, by Order No. 3560 issued on October 11, 2016, the Postal Regulatory Commission has granted the UPS motion for access to USPS-RM2016-10/NP1 for the above eleven individuals, provided the parties first execute an "agreement regarding inadvertent disclosure within five business days from the date of [the] Order";

NOW, THEREFORE, in order to protect the confidentiality of the identified information during the exchange of information, the Postal Service and UPS agree as follows:

1. The purpose of this Agreement is to facilitate consent to access Confidential Information the Postal Service filed with the Postal Regulatory Commission in the context of providing such Information to certain consultants and outside counsel representing UPS in Docket No. RM2016-10, as provided under the Commission's Rules and Order No. 3560 ("Intended Purpose").
2. For purposes of this agreement, the Disclosing Party is the Postal Service, and UPS is the Receiving Party. The Confidential Information to be disclosed consists of materials filed under seal in Docket No. RM2016-10 – specifically, USPS-RM2016-10/NP1.
3. This Agreement to consent to access shall terminate upon the date specified by the Postal Regulatory Commission. Separate and apart from this Agreement period, the parties agree that the information obtained shall be held in confidence ten years from the date of this Agreement. For that period, no Confidential Information may be disclosed or used outside of the Intended Purpose unless written consent is obtained from the Disclosing Party. All employees or agents of the Receiving Party who come into contact with the Confidential Information shall be notified of its confidential nature and shall use the same degree of care as they employ with their own proprietary information, but in all events shall use at least a reasonable degree of care.

4. The parties shall provide the same care to avoid disclosure or unauthorized use of the Information as it would provide to maintain the confidentiality of its own information, but in no event less than reasonable and prudent care, and the Confidential Information shall not be reproduced in any form except as allowed under rules or orders of the Postal Regulatory Commission, or otherwise distributed or sold by the parties in any manner whatsoever. The Receiving Party shall retain all such Confidential Information in a secure place with access limited only to such of its agents who need to know such information for purposes of this Agreement.

5. The Confidential Information shall be deemed the property of the Disclosing Party. The Receiving Party shall promptly return or provide evidence of destruction of all Confidential Information and copies thereof as required by rules or orders of the Postal Regulatory Commission. This Agreement does not confer any right, license, interest or title in, to, or under the Confidential Information to the Receiving Party and title to the Confidential Information shall remain solely in the Disclosing Party.

6. The Receiving Party shall be under no obligation to hold in confidence any Confidential Information which:

- a. is or becomes public through no fault of the Receiving Party;
- b. was known to the Receiving Party prior to the time of the disclosure by the Disclosing Party;
- c. is properly received by the Receiving Party on a non-confidential basis from any third party who is lawfully entitled to make such disclosure;
- d. is required by a judicial or administrative proceeding (including a proceeding to enforce this Agreement), or as otherwise required to be disclosed by law, in any such case after all reasonable legal remedies for maintaining such information in confidence have been exhausted, including, but not limited to, giving the Disclosing Party as much advance notice of the possibility of such disclosure as practical so the Disclosing Party may attempt to stop such disclosure or obtain a protective order concerning such disclosure; or
- e. is independently developed by the Receiving Party without breach of this Agreement.

7. The Receiving Party may release Confidential Information requested by any federal, state, or local governmental body in the proper exercise of its oversight or investigatory jurisdiction.

8. The Receiving Party shall include the terms of this Agreement in each subcontract whereunder there is any possibility of disclosure of the Confidential Information.

9. UPS hereby releases and will defend, hold harmless, and indemnify the Postal Service, each of its affiliates, and the respective directors, officers, personnel, agents, successors and assigns of the Postal Service, as well as any impacted third parties whose information is included within the scope of the Confidential Information, from and against any loss, damage, settlement, cost, expense, and any other liability (including reasonable attorneys' fees) arising out of or resulting from any allegation or claim based on or relating to (A) any unauthorized disclosure by UPS or its agents or use by UPS or its agents of information to which any protective condition applies, except to the extent such disclosure or use is agreed to by the Parties in writing, or permissible under an order or rule of the Postal Regulatory Commission, or (B) any act or

omission by UPS or its agents, including any breach of this Agreement or allegation or claim of negligence, strict liability, or misconduct (collectively the "Claims"). Further, in the interest of clarity, impacted third parties whose information is included within the scope of the Confidential Information will be indemnified for Claims arising out of or resulting from (i) the failure of UPS to perform its obligations under this Agreement; (ii) the infringement of any third party's intellectual property, intangible, or proprietary rights; and (iii) any misfeasance, malfeasance, or other violation of a third party's rights arising out of or in any way relating to this Agreement. UPS will use counsel reasonably satisfactory to the Postal Service to defend each Claim, and the Postal Service will cooperate with UPS in the defense. UPS will not consent to the entry of any judgment or enter into any settlement without the Postal Service's prior written consent, which may not be unreasonably withheld.

10. The Receiving Party acknowledges and understands that no representations or warranties of any kind, including, without limitation, fitness for a particular purpose, merchantability, and non-infringement, are given by the Disclosing Party with respect to the Confidential Information.

11. Nothing in this Agreement shall be deemed to create, either express or implied, the power in either party to bind the other. Neither party shall be bound by the actions of the other, shall be liable for the debts of the other, or shall have a right to share in the profits of the other.

12. This Agreement shall be construed under and governed by the Federal laws of the United States. If UPS violates this Agreement, then the Postal Service and any impacted third party shall be entitled, if it so elects, to institute and prosecute proceedings in any court of competent jurisdiction, either at law or in equity, to obtain damages for breach of this Agreement, or to obtain equitable relief to enforce its rights hereunder. The parties agree that money damages would not be a sufficient remedy for breach of the confidentiality and other obligations of this Agreement. Accordingly, each party agrees that in an action for equitable remedies under this Agreement, the disclosing party shall not be required to prove the inadequacy or insufficiency of monetary damages as a remedy. Each party further agrees to waive any requirement for a bond in connection with any such injunctive or other equitable relief.

13. If any provision of this Agreement is determined to be violative of the laws of the place where it is to be performed, then such provision shall be void and the other provisions of this Agreement shall remain in full force and effect.

14. This Agreement expresses the entire agreement and understanding of the parties with respect to the subject matter hereof and supersedes all prior oral or written agreements, commitments and understandings pertaining to the subject matter thereof. This Agreement shall not be modified or changed in any manner except in writing and signed by both parties.

15. Each party represents that it has caused this Agreement to be executed on its behalf as of the date written below by a representative empowered to bind that party with respect to the undertakings and obligations contained herein. The effective date of this Agreement is the later of the two execution dates shown below ("Effective Date").

In WITNESS WHEREOF, the Postal Service and UPS have executed this Agreement as of the Effective Date described in paragraph 15 above.

UNITED STATES POSTAL SERVICE_____
Signature_____
Signature_____
Name_____
Name_____
Title_____
Title_____
Date_____
Date**UNITED PARCEL SERVICE**_____
Signature_____
Signature_____
Name_____
Name_____
Title_____
Title_____
Date_____
Date**ACCORD: CANADA POST CORPORATION (*as an impacted third party*)**_____
Signature_____
Signature

Name

Name

Title

Title

Date

Date